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ADMINISTRATIVE LAW

DECEMBER 1954

BULLETIN • Vol. 7 • No. 1

ADMINISTRATIVE LAW SECTION of AMERICAN BAR ASSOCATION

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Nothing contained herein shall be construed as the action of the American Bar Association unless the same shall have been first approved by the House of Delegates or the Board of Governors.

PATRICK A. McCARRAN

At the request of the Chairman and Council, Carl McFarland, who had been for many years most closely associated with Senator McCarran in the work of the Section, has written for the Bulletin the following memorial to express our appreciation of the great part that Senator McCarran played in our history and activities.

Members of the Administrative Law Section were shocked and saddened at the passing of Senator Pat McCarran in September. To the public and to the bar generally he had been known for half a century, first as a state legislator, then as public prosecutor, jurist, and for twenty-one years as a member of the United States Senate. There he sponsored a long series of important statutes including such milestones as the Civil Aeronautics Act of 1938 and the Internal Security Act of 1951. He was a member of the Association and served as its vice president in 1922-23.

Lawyers everywhere will regret his loss. It is felt with particular sorrow by this Section, for Senator McCarran, perhaps more than any other legislator of our day, was concerned with the improvement of administrative justice. It was he who introduced and guided through the Senate the Administrative Procedure Act of 1946, which he termed "a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government". Later, when he feared that piecemeal exemptions from that act would cripple its effectiveness, he sought to eliminate all such exemptions and twice pushed corrective legislation through the Senate.

Another proposal of the Senator's was for a statutory commission to formulate

uniform rules of federal administrative procedure. He first introduced this bill in January, 1949, and only a month or so before his death it passed the Senate.

Senator McCarran's basic philosophy of legislation affecting administrative procedure is perhaps best expressed in his statement on introducing in 1949 his first bill for an administrative court:

> "We have a duty here to keep our governmental machine attuned to the needs of today and tomorrow and the years to come. What we do here in the way of substantive legislation will not long endure if we do not also make sure that we have a governmental machine that can handle it. At the same time we must maintain unbroken contact with our democratic tradition of a government of divided powers under law."

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Again, in speaking to the Administrative Law Section of the District of Columbia Bar Association in the same year, he said:

> "I do not think it can be successfully disputed that the present generation has seen a rebirth of controlled economy, of state supervision over the individual, and hence of bureaucracy. Whether these things are good or bad may be beside the point. The slow tide of history has swept them upon us, and forces beyond our immediate summoning must remove them if they are ever to be removed. Yet we certainly can and will fit the new state of things into our American pattern of justice."

Other major legislation in this field which the Senator sponsored included the bill enacted in May of this year providing judicial review of decisions of government contracting officers, and the bill to provide for an independent corps of hearing examiners (S. 1708), which was reported by the Senate Judiciary Committee in August.

As chairman of the Senate Judiciary Committee from 1943 to 1946 and again from 1949 to 1953, he carried the major burden of study and recommendation to the Senate of proposed legislation affecting subjects with which the Administrative Law Section is primarily concerned. Whether or not he agreed with the views of the representatives of the bar on a particular question, he was always ready to listen. When he was convinced of the wisdom of a measure, he became its tireless champion. We shall long miss his devotion to what he termed "total justice".

SUPREME COURT OCTOBER 1953 TERM

Agency Prejudgment

United States ex rel. Accardi v. *Shaughnessy,* 347 U. S. 260 (1954), arose out of a habeas corpus action in which petitioner attacked the validity of the denial of his application for suspension of deportation under the relevant provisions of the Immigration Act of 1917. Admittedly deportable, the petitioner alleged, among other things, that the denial of his application by the Board of Immigration Appeals was prejudged through the issuance by the At-

torney General in 1952, prior to the Board's decision, of a confidential list of "unsavory characters" including petitioner's name, which made it impossible for him "to secure fair consideration of his case." The District Judge refused the offer of proof, denying the writ on the allegations of the petitioner without written opinion. A divided Court of Appeals affirmed. A bare majority of the Supreme Court reversed, holding that petitioner was entitled to an opportunity to try to prove his allegation before the district court.

The principal ground which petitioner alleged was that on October 2, 1952—after the Acting Commissioner's decision in the case but before the decision of the Board of Immigration Appeals—the Attorney General announced at a press conference that he planned to deport certain "unsavory characters"; on or about that date the Attorney General prepared a confidential list of one hundred individuals, including petitioner, whose deportation he wished; the list was circulated by the Department of Justice among all employees in the Immigration Service and among the Board of Immigration Appeals; and that issuance of the list and related publicity amounted to public prejudgment by the Attorney General so that fair consideration of petitioner's case by the Board of Immigration Appeals was made impossible.

In the normal case, it is the settled rule that mere prejudgment on the part of an agency does not constitute such bias as to disqualify it from deciding a case. See *Federal Trade Commission* v. *Cement Institute,* 333 U. S. 683 (1948). One may, it is true, disagree with the basis of this rule on the ground that one who has already reached a decision with regard to a particular issue can hardly dispose of that issue with that "cold neutrality of an impartial judge" of which Burke speaks. But, since it is uniformly held that mere prejudgment is not enough to disqualify a judge in a court of law, there is, in the normal case, no warrant for imposing a stricter standard upon the administrative judge.

In *Accardi,* however, there was more than the usual type of prejudgment case. Under the relevant regulations, the Board of Immigration Appeals was required to exercise its own judgment when considering appeals. The clear import of broad provisions for a final review by the Attorney General himself would be meaningless if the Board were not expected to render a decision in accord with its own collective belief. In unequivocal terms the regulations delegate to the Board discretionary authority as broad as the statute confers on the Attorney General; the scope of the Attorney General's discretion became the yardstick of the Board's. And if the word "discretion" means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience. This applies with equal force to the Board and the Attorney General.

The instant petition, in the Court's opinion, charges the Attorney General with precisely what the regulations forbid him to do: dictating the Board's decision. The

Court, the agency involved—the ICC—had discretion was exercised. "Rather, we object to the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations." 347 U. S. at 268. The Board must rule out any consideration of the Attorney General's alleged list and, in arriving at its decision, exercise its own independent discretion, after a fair hearing, which is nothing more than what the regulations accord petitioner as a matter of right.

Findings

In *Secretary of Agriculture* v. *United States,* 347 U. S. 645 (1954), the Court has once again remanded a case to an agency because of the inadequacy of the findings made by it. According to Justice Frankfurter, who delivered the opinion of the Court objected, not to the *manner* in which not adequately explained its departure from prior norms and had not sufficiently spelled out the legal basis of its decision. "In short, the Commission has not explained its decision 'with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency * * *. We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' " Id. at 654.

Exhaustion of Administrative Remedies

In its well-known decision in *Myers* v. *Bethlehem Shipbuilding Co.,* 303 U. S. 41 (1938), the Supreme Court held that the exhaustion of administrative remedies rule was applicable even though it was claimed that the agency concerned had no jurisdiction under its enabling statute in the particular case. *Allen* v. *Grand Central Aircraft Co.,* 347 U. S. 535 (1954), is the most recent decision of the highest Court applying the *Myers* rule in a case where *constitutional* rather than statutory lack of jurisdiction is alleged. We have noted, says the opinion of Mr. Justice Burton, the constitutional arguments submitted, "but it would be premature action on our part to rule upon these until after the required administrative procedures have been exhausted." Id. at 553.

In the opinion of a majority of the Court, a case which involved a simple application of the rule of the *Myers* case, supra, was *Public Utilities Commission* v. *United Air Lines,* 346 U. S. 402 (1953). Plaintiff air line sought a declaratory judgment that the Public Utilities Commission of California had no jurisdiction over the rates charged by it for transportation between points on the mainland of California and Catalina Island. Plaintiff alleged that the Civil Aeronautics Board had exclusive jurisdiction over such rates. The District Court granted relief, but the Supreme Court reversed, holding that until the State agency actually held a hearing and issued an order against plaintiff, the suit was premature.

Of particular interest was the dissent by Justice Douglas, who asserted that, in a case like this, relief should be granted even

though plaintiff had not exhausted its remedies in the State Commission. There is nothing to be gained, said he, by requiring plaintiff to go through the long, laborious, expensive hearings before the California agency only to work its way through the hierarchy of courts up again to the Supreme Court so that it may determine whether or not the CAB has exclusive authority over these rates. The resolution of the jurisdictional question will in no manner be advanced by remitting plaintiff to hearings before a commission which—if the District Court was correct—has no jurisdiction to act. The Court should, he concludes, settle this controversy at this early stage. "By denying relief we advance no cause except that of litigation." Id. at 405.

Though Justice Douglas does not say so, his reasoning applies to every case where a court is asked to intervene to prevent agency action in excess of jurisdiction. In every such case, should not the Court be able to determine for itself whether the claim of lack of jurisdiction is valid? Where plaintiff makes out a *prima facie* case, it is difficult to see what cause except that of litigation is advanced by remitting plaintiff to hearings before an agency which—if plaintiff is correct—has no jurisdiction to act.

Where lack of agency jurisdiction is not alleged, the application of the rule requiring the exhaustion of administrative remedies is not nearly so controversial. The basis of the rule in such a case—i.e., one not involving the jurisdiction issue—was reaffirmed in *Twentieth Century Airlines* v. *Ryan,* 74 Sup. Ct. 8 (1953). That case arose out of a suit by irregular air carriers to enjoin the CAB from taking further action on a complaint against the carriers brought before the Board by its Office of Enforcement. The complaint, which prayed that certain licenses be revoked, had been set for a hearing before an examiner. The carriers in question sought to prevent the Board from taking any further steps, alleging that certain regulations upon which the complaint was based were invalid. Irreparable injury was alleged growing out of the disadvantages that flow to air carriers from charges of a breach of Board regulations or of the Act. It was said that safety is so important in air travel that the public reacts to any alleged violation, even though merely economic or administrative in character, somewhat as it would to a Board holding that safety protections were violated. It was further pointed out that financing arrangements of the carriers might be jeopardized because of provisions in loan agreements allowing withdrawals if orders deemed injurious by the lenders are entered by the Civil Aeronautics Board. Certainly, it was clear from applicants' affidavits that the pendency of the Board proceeding from respondents' point of view had objectionable effect on their public relations, called for large expenditures of time and energy, and affected employee morale.

In the District Court, a motion of the CAB to dismiss for failure to exhaust administrative remedies was granted. An appeal was taken to the Court of Appeals; but the Court denied a motion for an injunction pending appeal. The carriers then

applied to the Supreme Court for an order staying the effectiveness of the order of the Court of Appeals. According to Justice Reed, to whom the application for stay was assigned for hearing, the irreparable injury alleged consists of those serious but unavoidable damages that come to any regulated enterprise because of pending complaint by administrative agencies. The private financial arrangements of the carriers may be affected, public and employee relations damaged, but such threatened injury does not show the irreparable injury that might justify judicial intervention to stop the Board hearings until there is a judicial determination of the validity of the Board regulations. The administrative remedies offer ample protection to the carriers' rights.

The carriers had sought to distinguish *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752 (1947), *Macauley* v. *Waterman S.S. Corp.,* 327 U. S. 540 (1946), and *Myers* v. *Bethlehem Shipbuilding Corp., supra*—the leading cases applying the exhaustion rule—from the present case, in that the agency involved in those cases had "exclusive jurisdiction" by statute and therefore the courts were excluded. This attempt at distinction, said Justice Reed, was not impressive. Although the Civil Aeronautics Act of 1938 does not have that clause, its powers are obviously exclusive so far as the administration of the Act is concerned.

Reviewable Agency Action

It is well settled by now that the courts will review only agency action that is deemed "final." "Government action is 'final' in the sense here involved when at no future time will its impact on the petitioner become more conclusive, definite, or substantial." *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 154 (1951). Unless the test of "finality," or ripeness for review, is met, the courts will not review. "Although a litigant is the person most directly affected by the challenged action of the Government, he may not have 'standing' to raise his objections in a court if the action has not, as it were, come to rest." *Ibid.*

International Longshoremen's and Warehousemen's Union v. *Boyd,* 347 U. S. 222 (1954), did not, in the opinion of the majority of the Court, involve reviewable agency action. The plaintiff in that case was a union whose members went every summer from the west coast of continental United States to Alaska to work in salmon and herring canneries under collective-bargaining agreements. As the 1953 canning season approached the union and its members looked forward to this Alaska employment. A troublesome question arose, however, on account of the Immigration and Nationality Act of 1952. Section 212(d)(7) of that Act has language that given one construction provides that all aliens seeking admission to continental United States from Alaska, even those previously accepted as permanent United States residents, shall be examined as if entering from a foreign country with a view to excluding them on any of the many grounds applicable to aliens generally. This law created an acute problem for the union and those

of its members who were lawful alien residents. The union and its members insisted on another construction. They denied that Congress intended to require alien workers to forfeit their right to live in this country because they went to Alaska to engage in lawful work under a lawfully authorized collective-bargaining contract. The defendant immigration officer announced that the union's interpretation was wrong and that workers going to Alaska would be subject to examination and exclusion.

The union then brought an action to enjoin defendant from so construing the Immigration Act as to treat aliens domiciled in the continental United States returning from temporary work in Alaska as if they were aliens entering the United States for the first time. Declaratory relief to the same effect was also sought. The majority of the Court, through Justice Frankfurter, held that there was not on the record a controversy appropriate for adjudication. According to the Court's opinion, "Appellants in effect asked the District Court to rule that a statute the sanctions of which had not been set in motion against individuals on whose behalf relief was sought, because an occasion for doing so had not arisen, would not be applied to them if in the future such a contingency should arise. That is not a lawsuit to enforce a right; it is an endeavor to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable. Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." Id. at 223.

One wonders whether the Court is not being overly strict here in its application of the requirement of ripeness for review. It is well known that, of all the Justices on the present court, Justice Frankfurter has been the most inexorable in his insistence upon rigid adherence to that requirement. See Schwartz, 59 Yale L. J. 1228, 1249 (1950). Even he has admitted that "Finality is not, however, a principle inflexibly applied. If the ultimate impact of the challenged action on the petitioner is sufficiently probable and not too distant, and if the procedure by which that ultimate action may be questioned is too onerous or hazardous, 'standing' is given to challenge the action at a preliminary stage." *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 156 (1951).

Does not the instant case fall squarely within Justice Frankfurter's just-quoted statement? Involved here was not a hypothetical case to be decided by the courts in the abstract. At issue was a specific agency interpretation which was going to be applied to the members of the plaintiff union. If, as plaintiff alleges, such interpretation was illegal, why should its members have to run the risk of deportation in order to obtain a judicial declaration of such illegality? The opinion of the Court rests upon the view that there is no adverse effect from the interpretation standing alone. Only when it is applied in a particular deportation case, this view holds, would there be adverse effect and hence reviewability.

But this was precisely the view rejected by the Court in *Columbia Broadcasting System* v. *United States,* 316 U. S. 407 (1942) and *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123 (1951). The instant case would appear to come squarely within the holding of those decisions. As the dissenting opinion puts it, "For going to Alaska to engage in honest employment many of these workers may lose the home this country once afforded them. * * * can it be that a challenge to this law on behalf of those whom it hits the hardest is so frivolous that it should be dismissed for want of a controversy that courts should decide?" 347 U. S. at 226.

Review of Sanctions

The authority to impose sanctions is perhaps the principal weapon in the administrative armory. It is, indeed, that aspect of agency power that affects most directly the rights and obligations of private individuals. In view of its importance, it is essential that the agency imposition of sanctions be subject to review. At the same time, unless the sanction accompanies a final agency order, it may be held not to be sufficiently ripe for review.

Whether an agency sanction, which by itself has adverse effect, even though it is interim in nature, is immediately reviewable was the issue in *Stanard* v. *Olesen,* 74 Sup. Ct. 768 (1954). That case arose out of an action to restrain the Post Office Department from enforcing an interim order impounding petitioner's mail pending determination by the Department as to whether petitioner was using the mails unlawfully. The Department had issued a complaint against petitioner charging that she was using the mails for carrying on a scheme for obtaining money for articles of an obscene character. On the same day, the local postmaster ordered that mail addressed to petitioner should be impounded until further order. This order was issued without notice or hearing. Petitioner answered the complaint and a hearing was held, but a decision by the agency had not been rendered at the time the present action was brought. The District Court dismissed the action and petitioner appealed to the Court of Appeals, where the appeal was pending. Petitioner then appealed to Justice Douglas as Circuit Justice for relief from the interim order impounding her mail, until her appeal was heard or the matter was otherwise determined.

Justice Douglas was placed somewhat on the horns of a legal dilemma in dealing with petitioner's application. Though, as will be seen, he felt that the agency impounding order was illegal and reviewable, there was then pending the action to secure review in the Court of Appeals. For him to intervene with that action pending, said Justice Douglas, would run counter to the requirements of orderly procedure. He, therefore, denied the relief requested.

To the student of administrative law, more important than his denial of relief was Justice Douglas' clear indication that the impounding order was reviewable agency action, even though no final adjudication had been rendered by the agency, and, on the merits, beyond the authority of the Post Office. According to him, the

order to impound petitioner's mail is plainly a "sanction"—"for it may as effectively close down an establishment as the sheriff himself." Id. at 771. There is no apparent administrative remedy. The order is, therefore, clearly reviewable under Section 10(a) and (c) of the Administrative Procedure Act, which Justice Douglas quotes fully in his opinion.

On the merits, Justice Douglas expressly declares that the impounding order is illegal. The power of the Post Office Department to restrain the illegal use of the mails is, he says, subject to the APA. Under Section 9(a) of that Act, no sanction may be imposed except as authorized by law. Impounding one's mail is, as has been noted, a "sanction"; is it authorized by law? There is no statutory authority for the Post Office to impound mail without a hearing and before there has been any final determination of illegal activity. It may well be that there are strong policy arguments in favor of an interim impounding power. But it is for Congress, not the courts, to write the law. "The power to impound at the commencement of the administrative proceedings is not expressly delegated to the Post Office * * *. It carries such a grave threat, it touches so close to First, Fifth, and Sixth Amendment rights, it has such serious possibilities of abuse (unless carefully restricted) that I am reluctant to read it into the statute. I, therefore, strongly incline to the view that the interim order from which petitioner seeks relief is invalid." Ibid.

It is interesting to note that the interim impounding power exercised in this case was the subject of a bill (H.R. 569) introduced in the 83d Congress. It provided that, in matters affecting obscenity and lotteries and schemes to defraud, the Post Office could impound mail without notice. The House of Delegates of the American Bar Association, during its 1954 meeting, approved the grant of the power to impound where the public interest requires, but advocated an amendment to the bill providing for a court hearing before the Post Office could impound. Certainly, the bill referred to and the action by the A.B.A. do not indicate any awareness that the power proposed already exists. And the Post Office itself, in a manual published in 1939, stated that it had no such power. Despite this background, however, the power was exercised by the Department in the instant case. And it must be presumed that this case was not the isolated exception. One wonders why the Post Office bothered to have a bill introduced to give it this authority when it was blithely going ahead and exercising it anyway without any vestige of legal grant.

With the case just discussed, which clearly recognizes that agency sanctions are directly reviewable, should be compared *Barsky* v. *Board of Regents,* 347 U. S. 442 (1954), affirming 305 N. Y. 89, 111 N. E. 2d 222 (1953), which was decided by the highest Court on appeal from the New York Court of Appeals. The latter court had, in 1950, enunciated the doctrine that the New York courts might not review the measure of sanction imposed by an administrative agency in that State. *Sagos* v. *O'Connell,* 301 N. Y. 212, 93 N. E. 2d 644

(1950). The *Barsky* case contains a striking application of this doctrine of the New York court. It arose out of a proceeding to review the determination of the New York Board of Regents in disciplinary proceedings against doctors who had been convicted in a federal district court of contempt of Congress because of their refusal to produce certain records before a Congressional committee. The Board of Regents had ordered Barsky suspended for a period of six months, rejecting the recommendation of its Committee on Discipline that he should only be reprimanded. The determination of the Board was upheld both by the Court of Appeals and, on appeal with the consent of that tribunal, by the United States Supreme Court.

Among other matters considered by the Court of Appeals was the contention that the Regents dealt too severely with the appellant. To this contention, Judge Desmond summarily replied, "* * * it is enough to say that we are wholly without jurisdiction to review such questions." 111 N. E. 2d at 226. In a dissenting opinion, Judge Fuld of the New York court rejected this almost cavalier approach. He conceded that the court had heretofore declined, in most instances, to consider the measure of discipline imposed by an administrative agency. But, said he, there is no more reason here, than with other discretionary matters, why some limit should not be imposed on the exercise of discretion, and judicial review sanctioned, where that exercise is unsupportable on rational grounds and becomes arbitrary and capricious. In Judge Fuld's view, which certainly seems more consistent with the principles of our administrative law, the imposition of a sanction is to be treated like other discretionary authority. And, here as elsewhere, the concept of wholly unreviewable administrative discretion is repugnant to our basic notions.

In the Federal Supreme Court, the majority had no difficulty in holding that the decision of the New York court should be affirmed. The dissenting Justices appear, however, to have been greatly disturbed by the nonreviewability of the measure of discipline imposed by the agency concerned, even implying that, in a case like this, preclusion of review might involve the denial of rights guaranteed by the Fourteenth Amendment. Thus, Justice Black emphasizes the complete discretion conferred upon the Regents to impose any measure of discipline which they choose. They are fettered by no legislative standards in this respect. "And no court in New York can review the exercise of their 'discretion,' if it is shown that the Regents had authority to impose any discipline at all." 347 U. S. at 462.

The *Barsky* case indicates clearly that, even if the New York doctrine barring review of the measure of punishment imposed by an administrative agency is an undesirable one, it is by now firmly ingrained in the jurisprudence of the highest court of that State. And it shows further that the New York doctrine does not, in the view of the Supreme Court, violate the due process clause of the Federal Constitution. Recognizing this, the Committee on Administrative Law of the New York

State Bar Association proposed a statutory amendment to provide expressly for judicial review of administrative abuse of discretion as to the measure of punishment, penalty, or discipline. A bill to this end was passed by both Houses of the New York legislature but was vetoed by Governor Dewey on April 1, 1954. The veto message was based in part upon the fact that, under existing law, "where excessive penalties have been imposed, means for judicial rectification have not been found entirely lacking."

The best answer to the reasoning behind the Governor's veto is provided by the *Barsky* case itself. Certainly the judges on the New York Court of Appeals did not agree with the Governor's conclusion that they could rectify excessive administrative penalties. The majority of the court held, on the contrary, that they were wholly without jurisdiction to review the severity of the agency sanction. It is most unfortunate that a measure designed to fill the lacuna in judicial review in New York illustrated by the *Barsky* case was unable to run the gauntlet of Executive approval. To limit the reviewing power of the courts so as to preclude judicial consideration of the administrative sanctions imposed in particular cases is, in effect, to grant only a skeletonized form of review.

Scope of Review

The heart of the problem of scope of review, according to Professor Davis, is now the extent to which the courts do and should review the application of legal concepts to undisputed or established facts. Davis, *Administrative Law* 868 (1951). Under the well-known doctrine of *Gray* v. *Powell,* 314 U. S. 402 (1941), the scope of review in such cases is similar to that available in the case of findings of fact, even though it be conceded that findings involving the application of law to fact are, in Justice Murphy's phrase, more legal than factual in nature. *Cardillo* v. *Liberty Mut. Ins. Co.,* 330 U. S. 469, 478 (1947).

Howell Chevrolet Co. v. *NLRB,* 346 U. S. 482 (1953), appears to involve still another application of the *Gray* v. *Powell* doctrine. Petitioner there, a California corporation which operated an automobile agency at Glendale, California, under an agreement with General Motors Corporation to sell Chevrolet cars and trucks, objected to the jurisdiction of the NLRB. The Court of Appeals for the Ninth Circuit had asserted that the impact of automobile sales agreements of the kind here involved upon the question of whether petitioner's activities affected interstate commerce was not dependent upon whether those agreements squared with common law concepts of principal and agent, or employer and employee. Rather, said that court, the important matter was, how did the arrangement work? "Is the tie-up between respondent and General Motors Corporation, accomplished by this agreement, regardless of what it would be called under the traditional nomenclature used by lawyers, nevertheless such that the Board's finding that respondent 'is an integral part of that corporation's national system of distribution,' has '"warrant in the record" and a reasonable basis in law' [citing *NLRB* v. *Hearst Pub-*

lications, 322 U. S. 111, 131 (1944)—a leading case applying the doctrine of *Gray* v. *Powell*]. We think the answer is yes." *NLRB* v. *Howell Chevrolet Co.,* 204 F. 2d 79, 82 (9th Cir. 1953).

The Supreme Court affirmed, stating that "Under these circumstances the Board was justified in finding that Howell's repeated unfair labor practices tended to lead to disputes burdening or obstructing commerce among the states. It follows that the Board had jurisdiction to act under the facts it found." 346 U. S. at 484.

If the doctrine of *Gray* v. *Powell* were applied uniformly, the law of scope of review would be susceptible of simple summary. But the doctrine is sometimes not applied in cases seemingly similar to *Gray* v. *Powell.* See *Davis, Administrative Law* 887. In a number of recent cases, the Supreme Court has reversed agency action, as against logically unassailable dissenting opinions urging that the doctrine of *Gray* v. *Powell* compelled affirmance. See e.g., *Brannan* v. *Stark,* 342 U. S. 451 (1952); *NLRB* v. *Highland Park Co.,* 341 U. S. 322 (1951). At first glance, *FCC* v. *American Broadcasting Co.,* 347 U. S. 284 (1954), appears to involve another capricious refusal of the highest Court to apply the *Gray* v. *Powell* doctrine. At issue in it was the validity of an FCC order adopting certain interpretative rules in relation to radio and television "give-away" programs. The Court, in a unanimous opinion, held that "give-away" programs were not within the criminal statute prohibiting the broadcasting of any lottery, gift enterprise or similar scheme offering prizes dependent upon lot or chance and that the Commission rules attempting to prohibit such programs by licensing were invalid. The FCC's authority to enforce the criminal prohibition, by the exercise of its licensing power, is limited by the scope of the statute. Since the programs in question are not illegal under the statute, the Commission cannot employ the statute to make them so by agency action.

At issue in the instant case was the application of the statutory term "lottery, gift enterprise, or similar scheme" to the undisputed facts. Under the doctrine of *Gray* v. *Powell,* the administrative application must be upheld if it is reasonable. At the same time, there is no doubt that the Court in this case was reviewing not the *reasonableness,* but the *rightness,* of the FCC action. Why was not the *Gray* v. *Powell* doctrine applied to limit the scope of review here?

It may be said that what was involved in this case was the interpretation of the relevant statute, which was a question of law for the reviewing court. But such statutory interpretation is the very type of thing covered by *Gray* v. *Powell.* This is true even though, strictly speaking, the finding at issue in that case involved the application of a statutory term to a particular state of fact. As Justice Frankfurter has aptly pointed out, "Meaning derives vitality from application. Meaning is easily thwarted or distorted by misapplication." *Trust of Bingham* v. *Commissioner,* 325 U. S. 365, 380 (1945).

Though the *American Broadcasting Co.* case cannot be distinguished from *Gray* v.

Powell, and the cases following its doctrine on the ground that the question at issue in *American Broadcasting* was different in nature from those involved in the *Gray* v. *Powell* line of cases, there are two important differences which, even if not emphasized by the Court, help to explain its recent decision. In the *American Broadcasting Co.* case, if the FCC interpretation were to be upheld, the radio stations concerned would be guilty of violating the criminal statute prohibiting the broadcasting of lotteries and similar schemes. In addition, the interpretation by the FCC of the statutory term at issue conflicted with that taken by other agencies. As Chief Justice Warren expressed it, "We believe that it would be stretching the statute to the breaking point to give it an interpretation that would make such programs a crime. Particularly is this true when through the years the Post Office Department and the Department of Justice have consistently given the words 'lottery, gift enterprise, or similar scheme' a contrary administrative interpretation." 347 U. S. at 294. Even if one agrees with the doctrine of *Gray* v. *Powell,* these factors—that construction of a criminal statute is involved, though this may not be a criminal case, and that the challenged agency construction is at variance with that adopted by other agencies—should make the narrow review required by it inappropriate in this case.

Review of Agency Inferences

One of the aims of the sponsors of the Taft-Hartley Act appears to have been the elimination of the doctrine of *Republic Aviation Corp.* v. *NLRB,* 324 U. S. 793 (1945), under which an administrative finding can be based upon a reasonable presumption or inference drawn from the facts even though such finding is not supported by affirmative evidence in the record. *Radio Officers' Union* v. *NLRB,* 347 U. S. 17 (1954), indicates, however, that the review provisions of the 1947 revision of the labor law have not been effective to accomplish the above-stated purpose.

The *Radio Officers' Union* case involved conflicting decisions by the Courts of Appeals for the Second and Eighth Circuits. At issue were orders of the NLRB enforcing that provision of the Act making it an unfair labor practice for an employer to encourage or discourage union membership by means of discrimination. Petitioners contended that the Board's orders should not have been enforced by the Second Circuit because the record did not include "independent proof that encouragement of Union membership actually occurred." The Eighth Circuit subscribed to this view that such independent proof was required when it denied enforcement of the Board's order on the ground that it was not supported by substantial evidence of encouragement. The Board argued that actual encouragement need not be proved but that a tendency to encourage was sufficient, and "such tendency is sufficiently established if its existence may reasonably be inferred from the character of the discrimination."

This, according to Mr. Justice Reed was the very problem which the Court had considered in the *Republic Aviation* case. To the contention "that there must be evi-

dence before the Board to show that the rules and orders of the employers interfered with and discouraged union organization in the circumstances and situation of each company" the Court there had replied that the statutory plan for an adversary proceeding "does not go beyond the necessity for the production of evidential facts, however, and compel evidence as to the results which may flow from such facts * * *. An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." 324 U. S. at 800. See also *NLRB* v. *Nevada Consolidated Copper Corp.,* 316 U. S. 105 (1942). In these cases, said the Court, it had but restated a rule familiar to the law and followed by all fact-finding tribunals—that it is permissible to draw on experience in factual inquiries.

It was argued, however, that these cases ceased to be good law under the Taft-Hartley Act. The House Report on section 10 of the Act, in discussing "shocking injustices" resulting from limited court review of Board rulings, stated that "requiring the Board to rest its rulings upon facts, not interferences [sic], conjectures, background, imponderables, and presumed expertness will correct abuses under the act." Justice Reed stated that the Court did not read that statement nor other statements in the legislative history, upon which petitioners relied, to hold that the Board might not draw reasonable inferences from proven facts. The House Conference Report stated that under the Wagner Act standard of review courts had "abdicated" to the Board and "in many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even where the findings concerned mixed issues of law and fact [citing cases], or when they rested only on inferences that were not, in turn, supported by facts in the record [citing the *Republic Aviation* case]." The Report concluded that the amendment to Section 10(e), requiring Board findings to be "supported by substantial evidence on the record considered as a whole," "will be adequate to preclude such decisions as those in" the *Nevada Copper Corp.* and *Republic Aviation* cases.

In *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951), Justice Reed goes on, the Court carefully considered this legislative history and interpreted it to express dissatisfaction with too restricted application of the "substantial evidence" test of the Wagner Act. "We noted, however, that sufficiency of evidence to support findings of fact was not involved in the Republic Aviation case, and stated that the amendment was not 'intended to negative the function of the Labor Board as one of those

agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect.' There is nothing in the language of the amendment itself that suggests denial to the Board of power to draw reasonable inferences. It is inconceivable that the authors of the reports intended such a result for a fact-finding body must have some power to decide which inferences to draw and which to reject. We therefore conclude that insofar as the power to draw reasonable inferences is concerned, Taft-Hartley did not alter prior law." 347 U. S. at 50.

Public Tort Liability

By its enactment of the Federal Tort Claims Act, the Congress showed that it was ready, in the words of the highest Court, "to lay aside a great portion of the sovereign's ancient and unquestioned immunity from suit." *United States* v. *Spelar,* 328 U. S. 217, 221 (1949). Yet, even if we admit, as we must, that the Act of 1946 represents a significant step in the direction of an adequate system of State responsibility, it should not be overlooked that extension of the principle of State liability has one serious drawback.

As a practical matter, such extension tends to eliminate the personal responsibility of public officers which is so important as a check upon such officers. "If from an administrative point of view," states a noted French jurist in language paralleling that often heard from Anglo-American administrative lawyers, "it may be advantageous that one who suffers damage be prone to sue the Administration rather than the public officer, from a constitutional point of view one may still wish that the practice of suing officers personally before the law courts shall not be completely abandoned, for the possibility of personal liability is still the best method that has been found to prevent improper action by public officers." 1 *Hauriou, La Jurisprudence Administrative de 1892 à 1929*, 649 (1929).

The English common law may have placed all too much emphasis on the value of the rule of personal liability of officers as a constitutional safeguard. Still, it cannot be denied that a public officer who knows that he will have to respond with his own resources if he commits a personal fault is less likely to act maliciously or outside the scope of his official functions than one who feels that he is acting only as an impersonal agent of the administration. The best way of keeping the public officer in check, of inspiring him with a sense of duty is to warn him that there is a certain point at which he loses the status of impersonal cogwheel in a large public service; at which he becomes a human being with duties and responsibilities, and at which, as such, he finds himself confronted by the average citizen to whom he will be declared personally liable.

If the State were rendered liable in all cases where a private individual is injured by governmental action that would tend all but to eliminate the personal responsibility of the administrative officers whose

acts caused the damage. Even though such officers continue, in theory, to be liable to suit, those injured will, in practice, almost always prefer to sue the State, for execution of a judgment against it need never run the hurdle of the defendant's possible impecuniousness.

The practical effect of the extension of public tort liability that has occurred under statutes like the Federal Tort Claims Act has been to free public officers from personal liability, inasmuch as the individual with a choice of remedies always tends to sue the State. Yet this does not mean that the augmentation of State responsibility must completely eliminate the personal responsibility of administrative officers. The needed check on the administrative official that was formerly supplied by his personal responsibility could still be obtained by making the officer personally liable to the State under a theory of subrogation, where the State is compelled to pay damages caused by the officers' personal fault.

United States v. *Gilman,* 347 U. S. 507 (1954), indicates, however, that this solution is not contemplated under the Federal Tort Claims Act. The question at issue there was whether the United States might recover indemnity from one of its employees after it had been held liable under the Tort Claims Act for the negligence of the employee. The Court, speaking through Mr. Justice Douglas, answered the question in the negative, holding that, in the absence of statutory authorization, the Government had no right of indemnity against an employee whose negligence had made it liable for damages.

In the *Gilman* case, the Court appears to have felt that it was for the legislature to impose liability upon public officers to indemnify the Government. And this was true despite the fact that the Congress in the Tort Claims Act, by imposing liability upon the United States for the negligent acts of its employees, has placed it in the general position of a private employer. And a private employer clearly has a common-law right of indemnity against an employee whose negligence has made the employer liable. To apply the common-law rule here, said Justice Douglas would, however, involve grave consequences upon the relations between the United States and its employees. "We have no way of knowing what the impact of the rule of indemnity we are asked to create might be. But we do know the question has serious aspects—considerations that pertain to the financial ability of employees, to their efficiency, to their morale. These are all important to the Executive Branch." Id. at 510. The claim asserted in this case, Justice Douglas went on, gives rise to questions of policy of great import to the whole field of government employment. "The selection of that policy, which is most advantageous to the whole, involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them." Id. at p. 511.

The decision in *Gilman* may not be of very great significance at the present time, when public tort liability is still subject to so many exceptions in this country. But

the same will not be true if and when we establish a complete and comprehensive system of State responsibility. From the point of view of those injured by administrative action such a system is, of course, the ideally practical solution, for a judgment against the State is one that will be paid.

Yet there remains the need for a check on the commission of personal faults by public officers—a check which will no longer be furnished by the possibility of personal liability to those damaged by their acts. Such liability becomes a matter of academic theory where the State is also liable, for the victim of administrative action will almost always sue the State rather than the officer. And it is here that the holding of the *Gilman* case will make for a serious lacuna in our law. If the damage is caused by the personal fault of an administrative officer, he should be personally liable, not only to the citizen injured, but also to the State, which, as a practical matter, will have to make the citizen whole for his damage.

It is the need for personal liability of public officers, in practice as well as theory, that the decision of the United States Supreme Court in the *Gilman* case appears unduly to overlook. If the emphasis of the common law upon personal liability of officers as a safeguard against administrative abuses of power had real merit in the heyday of the rule of strict personal liability, its worth has certainly not diminished in an era when administrative authority has increased a hundred-fold. Doubtless, as Mr. Justice Frankfurter has said, Dicey's famous statement that, with us, every official, from the Prime Minister down to a constable or a collector of taxes, is liable on the same basis as any other citizen "was an idealization of actuality. But in the perspective of our time its validity as an ideal has gained and not lost." *Great Northern Ins. Co.* v. *Read,* 322 U. S. 47, 59 (1944).

STATE CASES

Exclusiveness of record.—Under common agency practice, the administrative hearing is normally conducted by one official and the ultimate decision made by another. The problem that naturally arises is that of how to convey the information acquired by the hearing officer to the one who decides. The usual method of transmission from the hearing officer to the agency has been the employment of so-called intermediate reports.

In its celebrated decision in *Local Government Board* v. *Arlidge,* [1915] A. C. 120, the House of Lords held that the private individual in an agency proceeding had no right to disclosure of a hearing officer's report. In this country, on the other hand, it has generally been assumed that those affected have a right to see such a report and to take exceptions to it before the decision of the agency is rendered. For an agency decision to be based upon a secret report, by an examiner or some other officer, would be for it to violate the right of the private party to have his de-

cision based only upon evidence in the record.

Though this view clearly seems consistent with our basic administrative-law principles—and it has, indeed, been given express statutory articulation in Section 7(d) of the Federal Administrative Procedure Act—there has not, prior to 1954, been a decision by an ultimate appellate tribunal in this country expressly on the point. During the year, however, the question of the right of the parties to disclosure of an administrative hearing officer's report which plays a part in the decision process has been clearly answered in the affirmative in *Mazza* v. *Cavicchia,* 15 N. J. 498, 105 A. 2d 545 (1954)—a well-reasoned decision by the Supreme Court of New Jersey.

In the case referred to, the private party had had his license to sell alcoholic beverages suspended after a hearing, which had been held before a hearer of the agency. The hearer had forwarded the record of the hearing to the agency head together with a report of his findings and conclusions, but a copy thereof was not furnished to the private party. The court held that the failure to disclose the hearer's report violated the individual's statutory right to a hearing. Though, in a field such as liquor licensing, there is no constitutional right to be heard, where a statute expressly requires a hearing, it carries with it the elementary due process requirement that the hearing be fairly conducted. And this precludes the submission by a hearer to the deciding authority of secret reports containing findings of fact, conclusions of law, and recommendations for the disposition of the case.

In his opinion, Chief Justice Vanderbilt starts by reiterating the fundamental principle of exclusiveness of the record, upon which the case is seen to turn. "In any proceeding that is judicial in nature, whether in a court or in an administrative agency, the process of decision must be governed by the basic principle of the exclusiveness of the record. 'Where a hearing is prescribed by statute, nothing must be taken into account by the administrative tribunal in arriving at its determination that has not been introduced in some manner into the record of the hearing.' Benjamin, Administrative Adjudication in New York, 207 (1942). Unless this principle is observed, the right to a hearing itself becomes meaningless. Of what real worth is the right to present evidence and to argue its significance at a formal hearing, if the one who decides the case may stray at will from the record in reaching his decision? Or consult another's findings of fact, or conclusions of law, or recommendations, or even hold conferences with him?" 105 A. 2d at 554.

The principle of exclusiveness of the record necessarily bars the use of the hearer's report as an aid in the decision process unless it is made part of the record. Whatever actually plays a part in the decision should be known to the parties, and subject to being controverted. The hearer's report obviously played a part in the decision in this case. For it to have played such a part without having been shown to the private party clearly violates his right

to have the decision based exclusively upon matters in the record, which are known to him and can consequently be controverted by him. The individual litigant is entitled to be apprised of the materials upon which the agency is acting. He has a right not only to refute but, what in a case like this is usually more important, to supplement, explain, and give different perspective to the hearer's view of the case.

The hearing has been given a particular form and character by the legislature for the purpose of satisfying those whose interests may be involved that all relevant facts and considerations will be put fairly before the agency head, so that he may arrive at a just decision. When the report giving the hearer's digest of the evidence and his findings and recommendations is turned over to the Director without coming to the attention of the private party, doubt may well arise as to whether a true view of the facts has been conveyed. The very purpose of the statute is that the hearing should be public, but how can it be said that the hearing is public when the report which summarizes it as to both law and facts and makes recommendations as to sanctions is private?

The hearer may have drawn some erroneous conclusion in his report, or he may even have made some factual blunders. Such mistakes are not uncommon in both judicial and administrative proceedings; indeed, the whole process of judicial review in both fields is designed to guard against them. But if a party has no knowledge of the secret report or access to it, how is he to protect himself? An unjust decision may very likely be the result where no opportunity is given to those affected to call attention to such mistakes. That is why it is a fundamental principle of all adjudication, judicial and administrative alike, that the mind of the decider should not be swayed by materials which are not communicated to both parties and which they are not given an opportunity to controvert. In the instant case the hearer can be characterized as a "witness" giving his evidence to the judge behind the back of the appellant, who has no way of knowing what has been reported to the judge.

The strongest argument for the agency in the instant case was based upon the famous *Morgan* cases, 298 U. S. 468 (1936), 304 U. S. 1 (1938), which, it was claimed, established its right to rely on secret examiner reports. As Chief Justice Vanderbilt pointed out, however, this claim was grounded upon a fundamental misunderstanding of what the Supreme Court had said on the subject in the *Morgan* cases. "What the Supreme Court held in the two Morgan cases was that an administrative hearing officer did not have to make a report for the guidance of the agency head at the close of the hearing. Nowhere in its opinions did the court imply, much less hold, that, *if such a report by a trial examiner or hearer were actually made,* it could be kept secret. On the contrary, the court, in the Second Morgan case, struck down agency action where it was based upon *ex parte* findings prepared for the agency head by the *prosecution* behind the backs of the private parties." 105 A. 2d at 556.

The Federal Supreme Court has thus never upheld the non-disclosure of an examiner's report. It has said only that such a report need not be made in a particular case. One familiar with Chief Justice Hughes' opinion in the second *Morgan* case must, indeed, find it difficult to believe that the Court which concurred in it could hold otherwise than as the New Jersey court did in a case like the instant one. The situation in the present case may not be so extreme as that in *Morgan II,* but, as Chief Justice Vanderbilt points out, is not the principle of exclusiveness of the record equally violated where the hearing officer is permitted to make an *ex parte* report for the benefit of the administrative judge?

The instant decision thus maintains the disclosure of examiner's reports as a basic feature of the process of administrative decision. "Without that feature the use of a hearer's report is like a performance of *Hamlet* without the Prince of Denmark." Id. at 560.

HEARING EXAMINERS

The problem of federal hearing examiners has engaged the active interest of the Section for the last several years, and has been the subject of frequent report and comment in the Bulletin (see 5 Ad. L. Bul. 93; 6 Ad. L. Bul. 10, 12, 59, 71, 75, 105, 125, 132, 137, 150, 211).

Action at the 1954 Mid-winter Meeting

At the 1954 mid-winter meeting of the American Bar Association in Atlanta the Section proposed, and the House of Delegates adopted, the following resolutions:

WHEREAS, The American Bar Association believes that the fair and efficient hearing and impartial decision of cases of adjudication before Federal administrative agencies can be achieved only if hearing officers are afforded maximum assurance that they must and can exercise fully independent judgment in hearing and initially deciding cases; and

WHEREAS, the impartial conduct of cases by Federal hearing officers is not adequately safeguarded against agency influences by the regulations and practices which have been evolved under Section 11 of the Administrative Procedure Act; and

WHEREAS, the attainment of the fair hearing and impartial decision objectives of the Administrative Procedure Act requires an unmistakably clear legislative mandate for the independent appointment, tenure and compensation of Federal hearing officers;

NOW, THEREFORE, BE IT RESOLVED, that the American Bar Association advocates the amendment of Section 11 of the Administrative Procedure Act so as to eliminate the authority of the Civil Service Commission with respect to Federal hearing officers and otherwise to achieve the principles and objectives stated in the premises; and

BE IT FURTHER RESOLVED, that the American Bar Association advocates the independent appointment of Federal hearing officers, whether by an independent Office of Federal Administrative Procedure if such an office is created, by Presidential appointment, or by other appropriate means; and

BE IT FURTHER RESOLVED, that the American Bar Association advocates that any

amendment of Section 11 of the Administrative Procedure Act to provide for such independent appointment should contain an appropriate grandfather clause; and

Be It Further Resolved, that the American Bar Association advocates that any such amendment of Section 11 of the Administrative Procedure Act should provide also for independence of Federal hearing officer personnel from any agency control impairing the attainment of fair hearing and impartial decision objectives; and

Be It Further Resolved, that the American Bar Association welcomes the contributions presently being made to the solution of these problems by the President's Conference on Administrative Procedure and the Hoover Commission; and

Be It Further Resolved, that the Section of Administrative Law is hereby authorized and directed to represent the American Bar Association before appropriate committees of Congress, as well as before the President's Conference on Administrative Procedure and its committees and the Hoover Commission to the extent that such participation is deemed appropriate in pursuance of the foregoing objectives.

Action at the 1954 Annual Meeting

At the 1954 annual meeting in Chicago the Section devoted a large part of one session to the consideration of problems relating to the appointment and status of federal hearing examiners. The subject was presented initially by Earl W. Kintner, chairman of the committee on that subject of the President's Conference on Administrative Procedure, and by Richard S. Doyle, another member of the committee. All members of the committee, some of whom held different views, had been invited to attend, but only Mr. Kintner and Mr. Doyle had found it possible to do so. The general discussion that followed was participated in by federal administrative officials, federal hearing officers, other members of the President's Conference, and other active practitioners, as well as members of Section committees that had been particularly concerned with this subject. Following this discussion, the Section delegated to the Council authority to recommend to the House of Delegates at a later meeting the position to be adopted on the subject of federal hearing examiners, in amplification of the position recommended by the Section and adopted by the House at Atlanta, in the light of such reports as might be made by the President's Conference on Administrative Procedure and the Hoover Commission.

Section Committee on Hearing Examiners

The subject has been committed this year to a single Section committee, the Committee on Hearing Examiners, rather than to three committees as last year. The chairman of the Committee on Hearing Examiners is Herman Tocker, whose term as a member of the Council expired at the 1954 annual meeting. Members of the Section who desire to express views for consideration by the Committee on Hearing Examiners and by the Council are requested to transmit such views to Mr. Tocker at 734 Fifteenth Street, N.W., Washington 5, D. C.

Action of the President's Conference

The President's Conference on Administrative Procedure held its final plenary

sessions on October 14-15 and November 8-9, 1954. The Conference had before it two conflicting reports of its Committee on Hearing Officers, one by Messrs. Kintner, Doyle, Reynolds and Winings favoring administration of the hearing examiner system by an independent Office of Administrative Procedure; the other by Messrs. Lester, McElvain, Meloy and Scharnikow favoring continued administration by the Civil Service Commission with the establishment of a new Bureau of Hearing Examiner Administration. It had before it also the Atlanta resolutions of the American Bar Association against Civil Service Commission administration. At the October session the Conference adopted (by a vote of 35 to 23 on the fundamental question, Conference Calendar No. 21) the proposals of the Lester-McElvain-Meloy-Scharnikow group (though it rejected one proposal in which both groups had concurred, that a single salary grade be established for the hearing officers in each agency). At the November session Mr. Kintner moved to reconsider the October vote on Calendar No. 21. To prevail the motion to reconsider would have required 38 votes, a majority of the membership of the Conference. It was supported by 30 votes, and thus failed to carry.

Resolutions of the President's Conference

The resolutions finally adopted by the President's Conference were as follows:

The Conference recommends to the Civil Service Commission:

1. Bureau of Hearing Examiner Administration. That the Civil Service Commission, under Section 11 of the Administrative Procedure Act, establish a new Bureau of Hearing Examiner Administration, charged with the responsibility for the hearing examiner program; and provide

   (a) that a committee of five persons be placed in charge of the Bureau, at least two of whom are lawyers who are well versed in Federal administrative adjudication, and at least two of whom are officials of the Commission who have the broad gauge view of the hearing examiner program.

   (b) that subordinate personnel be assigned to the Bureau, either on a full time basis, or by detail from other bureaus of the Commission.

2. Qualification Standards of Hearing Examiners. That the Civil Service Commission maintain qualification standards of hearing examiners at least as high as those presently established.

3. Recruitment of Hearing Examiners. That the Civil Service Commission continue recruitment of hearing examiners on an open competitive basis, and concentrate on the most likely source of qualified applicants, such as lawyers with trial experience in administrative law both in and out of Government; and provide

   (a) that a competitive register of candidates for appointment be maintained, on a current basis as far as practicable;

   (b) that the selection for appointment to hearing examiner positions be by the promotion, transfer or reinstatement of hearing examiners, or by appointment from the open competitive register.

4. Career-Merit System. That the Civil Service Commission retain the Career-Merit System.

5. Salary Grades of Hearing Examiners. That the Civil Service Commission establish for the hearing examiners in each agency one or more salary grades, taking into account the diversity of the agency's functions, the desirability of minimizing the administration of promotions, and the possibility of recruiting examiners at lower grades and increasing their compensation as, through increased experience and competence, they perform increasingly responsible work.

6. Compensation of Hearing Examiners. That the Civil Service Commission fix the level of compensation for hearing examiners between $8,300 (GS-13) and $11,800 (GS-15), under the Classification Act, until higher grades are available thereunder; and revise the classification specifications

   (a) to bring the illustrative examples of cases up to date, and to express the substantive portions of the specifications in less technical and simpler language; and

   (b) to delete the language that erroneously suggests that length of record is of some importance in prescribing the level of compensation of the hearing examiner.

The Conference recommends to the agencies:

1. Removal of Hearing Examiners. That the agencies, under the procedures for removal of hearing examiners set forth in Section 11 of the Administrative Procedure Act, study more closely the performance of hearing examiners, and initiate removal proceedings where appropriate.

Proposals of the Committee on Hearing Officers of the President's Conference

By way of summary of the conflicting positions of the two groups of the Committee on Hearing Officers of the President's Conference, there are reproduced below the proposals initially made by each as they appeared as items on the Conference Calendar (Calendar Nos. 21 to 29). Recommendations headed "Alternative I" are those of the Kintner-Doyle-Reynolds-Winings group; recommendations headed "Alternative II" are those of the Lester-McElvain-Meloy-Scharnikow group.

Amendments suggested from the floor during Conference consideration and accepted by the proponents of particular proposals are noted in brackets following the text of each proposal so amended. Withdrawals of proposals during Conference consideration are also so noted.

Calendar Nos. 27, 28 and 29, reproduced below, were tabled by vote of the Conference on November 8.

Calendar No. 21 (Administration)

The Conference recommends:

Alternative I

That the Office of Administrative Procedure, recommended by this Conference on November 23-24, 1953, be established and be expanded to include the administration of the hearing officer program and that such office be independent of any existing agency or department.

a. that the Office perform the following functions relating to the hearing officer program:

(1) recruiting, qualifying, and maintaining a list of currently qualified hearing officer candidates;

(2) overseeing matters of compensation, tenure and retirement; administration of removal procedures;

(3) constantly guarding against any encroachment upon the independence of hearing officers or upon the integrity of the administrative process.

b. that the Office of Administrative Procedure perform those additional functions heretofore recommended by the Conference:

(1) carrying on continuous studies of the adequacy of the procedures by which Federal Agencies determine the rights, duties and privileges of persons;

(2) initiating cooperative effort among the agencies and their respective bars to develop and adopt as far as practicable, uniform rules of practice and procedure;

(3) collecting and publishing facts and statistics concerning the procedures of the agencies;

(4) assisting agencies in the formulation and improvement of their administrative processes.

c. that the Office be nonpartisan and consist of five members appointed by the President, as follows:

(1) a government expert in the field of Federal administrative law;

(2) a member of an independent Federal regulatory agency;

(3) a law professor;

(4) and (5) two nongovernment practicing lawyers.

d. that the members of the Office be authorized to employ an executive director and an appropriate staff.

e. that the members be empowered to call upon the services of other government agencies where appropriate and to designate panels of consultants.

f. that the first board members be appointed for terms of 1, 2, 3, 4 and 5 years respectively, the term of each to be designated by the President, but that their successors be appointed for terms of 5 years.

[The proponents of Alternative I accepted an amendment to substitute, for paragraphs c and f, a paragraph c as follows:

"c. that the Office be nonpartisan and consist of five members appointed by the President for individual terms of 1, 2, 3, 4, and 5 years as respectively designated by the President, and that their successors be appointed for terms of 5 years."]

Alternative II

That the administration of the hearing examiner program be continued by the Civil Service Commission under Section 11 of the Administrative Procedure Act and that the Civil Service Commission establish a new Bureau of Hearing Examiner Administration.

a. that the new bureau be charged with the responsibility for the hearing examiner program that is now divided among three bureaus of the Commission;

b. that a committee of five members be placed in charge of the bureau;

c. that there be brought into the administration of the hearing examiner

program additional persons who have recently been engaged in the preparation and presentation of cases before administrative agencies, and that at least two of the members of the committee be lawyers who are well versed in Federal administrative adjudication and at least two of the members of the committee be officials of the Commission who have the broad gauge viewpoint of the hearing examiner program;

d. that subordinate personnel be assigned to the bureau, either on a full time basis, or by detail from other bureaus of the Commission.

[The proponents of Alternative II accepted an amendment to change the word "members" in paragraph b to "persons".]

Calendar No. 22 (Qualifications)

The Conference recommends:

Alternative I

That qualification standards of hearing officers be raised substantially beyond those presently in force and that such standards be fixed within the discretion of the Office of Administrative Procedure but include as a minimum:

a. a law degree and membership in a bar.

b. six years' continuous legal experience immediately preceding qualification.

c. adequate experience as a participant in adversary proceedings before courts of record or in administrative agencies.

d. sufficient experience in the field of administrative law to insure familiarity with the administrative process.

Alternative II

That the present high qualification standards established by the Civil Service Commission be retained.

[The proponents of Alternative II accepted an amendment to state Alternative II in the following form:

"That qualification standards at least as high as those presently established by the Civil Service Commission be maintained."]

Calendar No. 23 (Recruitment, Selection and Appointment)

The Conference recommends:

Alternative I

1. That the following appointment procedure be adopted:

a. that the Office of Administrative Procedure recruit candidates and prepare and maintain a list of currently qualified candidates.

b. that the entire list be submitted to the agencies when appointments are to be made, and that the agencies select from that list the person or persons they desire.

c. that the person or persons so selected, upon approval by the Office of Administrative Procedure, be nominated by that Office for appointment by the President.

d. that hearing officers be housed in the selecting agencies but that there be reasonable provision for exchange or transfer in accordance with the fluctuating requirements of the various agencies.

2. It is recommended that a career-merit system be established for hearing officers.

Alternative II

1. That:

a. recruitment be continued on an open competitive basis, and concentrated on the most likely source of qualified applicants, such as lawyers with trial experience in administrative law both in and out of Government;

b. a current competitive register of candidates for appointment be established biennially;

c. selection for appointment to hearing examiner positions be limited to either the promotion, transfer or reinstatement of hearing examiners or appointment from the open competitive register.

2. It is recommended that the career-merit system be retained.

Calendar No. 24 (Compensation)

The Conference recommends:

1. That a single salary grade be established for the hearing officers in each agency.

Further—

Alternative I

2. That:

a. the Office of Administrative Procedure in the future, as part of its continuing study of the hearing officer program, give careful consideration to the advisability of instituting a one-grade system throughout government;

b. the level of compensation for hearing officers be raised to a range between $12,000 and $14,000 per year and that the Office of Administrative Procedure be given authority, after consultation with the agencies, to fix the specific salary for a particular agency within the stated range.

Alternative II

2. That:

a. compensation be prescribed in accordance with the Classification Act;

b. the classification specifications be revised (1) to bring the illustrative examples of cases up to date and to express the substantive portions of the specifications in less technical and simpler language, and (2) to delete the language that erroneously suggests that length of record is of some importance in prescribing the level of compensation of the hearing examiner;

c. the level of compensation for hearing examiners range between $8,300 (GS-13) and $11,800 (GS-15) until higher grades are available under the Classification Act.

Calendar No. 25 (Tenure and Retirement)

The Conference recommends:

That hearing officers have tenure until retirement; and that retirement age and retirement benefits be consistent with those applicable to other employees of the Executive Branch.

[Calendar No. 25 was withdrawn by the Committee.]

Calendar No. 26 (Removal)

The Conference recommends:

1. That removal be for cause only after hearing and upon the record thereof.

Further—

Alternative I

2. That a qualified person designated by the Office of Administrative Procedure

conduct the removal hearing, and a three-member review board designated by the Office of Administrative Procedure, but acting independently of that Office, hear all appeals from the initial decision.

[Alternative I (for paragraph 2) was withdrawn by its proponents.]

Alternative II

2. That the procedures for removal of hearing examiners as set forth in Section 11 of the Administrative Procedure Act be retained.

3. That the agency study more closely the performance of hearing examiners and initiate removal proceedings where appropriate.

Calendar No. 27 (Reduction in Force)

The Conference recommends:

Alternative I

That present reduction-in-force rules be made inapplicable to hearing officers; that where an agency's hearing officer requirement is reduced, surplus hearing officers be placed under the supervision of the Office of Administrative Procedure; that such officers be available for temporary assignments; and that they be given preference by law for any permanent hearing officer positions arising in other agencies.

Alternative II

That agencies avoid or minimize the application to hearing examiners, of the reductions of force provided by law (1) by utilizing hearing examiners from other agencies, under Section 11 of the Administrative Procedure Act, to meet unusual caseloads, rather than by appointing additional examiners to their staffs; and (2) by considering, in its determination of the classes of its employees to be separated in a necessary reduction in force, the loss of ability, experience, and training entailed in the separation of hearing examiners.

Calendar No. 28 (Grandfather Clause)

The Conference recommends:

Alternative I

That incumbent hearing officers be retained and that any amendment of the Administrative Procedure Act, or other legislation concerning the hearing officer program, contain a "grandfather clause" which will blanket-in all incumbent hearing officers.

Alternative II

That incumbent hearing examiners be retained subject only to the removal provisions of Section 11 of the Administrative Procedure Act.

Calendar No. 29 (Implementation of Recommendations)

The Conference recommends:

Alternative I

That Civil Service Commission jurisdiction over the hearing officer program under Section 11 of the Administrative Procedure Act be terminated and that appropriate legislation amending the Administrative Procedure Act be recommended by the President's Conference for the purpose of implementing these recommendations.

Alternative II

That no statutory changes be made.

S. 1708, 83d Congress

S. 1708, a bill introduced in the 83d Congress by Senator McCarran, which

provided for appointment of hearing examiners by the President with the advice and consent of the Senate, was reported favorably to the Senate by the Committee on the Judiciary on August 2, 1954 (S. Rept. No. 2199). It was not acted on by the Senate before adjournment.

The Hoover Commission

It is understood that the federal hearing examiner problem is one of the subjects under consideration by the Task Force on Legal Services and Procedure (see 6 Ad. L. Bul. 49). No information is presently available as to what solution the Task Force may have in mind, nor is it known when the Hoover Commission will report its recommendations.

UNIFORM RULES

Following consideration by the Section since 1948 of the feasibility and desirability of uniform rules of administrative procedure (see 1 Ad. L. Bul., No. 2; 34 A.B.A. J. 877, 896, 1011), the 1951 annual meeting of the Section in New York adopted the following resolution:

That the Administrative Law Section approves in principle the desirability of exploring the possibility of securing some uniformity in rules of federal administrative procedure and suggests that any commission created for that purpose, such as the commission proposed in S. 17, be so constituted as to make adequate provision for the complete representation thereon of administrative agencies and the legal profession.

Action at the 1952 Annual Meeting

At the 1952 annual meeting of the Section in San Francisco, the Committee on Improvement of Administrative Procedures submitted a Special Report on Uniform Rules of Procedure opposing the enactment by the 82d Congress of S. 17, which would have provided for the creation of an Administrative Rules Commission of nine members charged with the duty of formulating general rules of practice and procedure for federal administrative agencies.[1] The opening and closing paragraphs of the report were as follows:

> "The Committee on Improvement of Administrative Procedures recommends to the Section of Administrative Law that it take steps to oppose the enactment by the present Congress of S. 17, which has passed the Senate and is now under consideration by the Judiciary Committee of the House of Representatives. This recommendation is not based upon opposition to the goal of S. 17, which is to bring about the greatest feasible uniformity in the rules of practice of federal administrative agencies. Our belief that the passage of S. 17 would be unfortunate is based on (1) the pendency at this time of a proposal for consideration of improvements in federal administrative procedure on a broader basis and (2) undesirable provisions in S. 17 which we believe it would be impracticable to attempt to have elimi-

[1] The members would be the chairmen and ranking minority members of the Committees on the Judiciary of the Senate and House of Representatives or the next in seniority willing to serve; an Assistant Attorney General (designated by the Attorney General); the head of an independent agency (designated by the President); the senior Chief Circuit Judge willing to serve; a dean of a law school (designated by the President); and a practicing lawyer (designated by the President).

nated during the life of the 82nd Congress." (4 Ad. L. Bul. 124.)

> "For the foregoing reasons we oppose the enactment of any bill now, and urge that attention be given to the problem of uniformity of rules through the broader approach to problems of administrative procedure which is presently contemplated. If legislation is nevertheless to be enacted at this session, we think the Section should urge at least the changes necessary to deal with the matters covered in this report." (4 Ad. L. Bul. 126.)

The pending proposal to which the report referred was the proposal of the Judicial Conference that resulted in the spring of 1953 in the setting up of the President's Conference on Administrative Procedure.

The report was approved by vote of the Section meeting, which authorized the Council to take appropriate action including, if the Council thought it wise, application to the House of Delegates at its 1953 mid-winter meeting for authority to oppose whatever new bill might be introduced in the 83d Congress in the form of S. 17, 82d Congress.

Action at the 1953 Mid-winter Meeting

The Council at its 1953 mid-winter meeting decided against seeking at that time from the House of Delegates authority to oppose S. 17, and decided instead to ask the House for affirmative authority to further the Judicial Conference proposal. The following resolution, submitted by the Council for the Section, was adopted by the House of Delegates at its 1953 mid-winter meeting:

WHEREAS, The Judicial Conference of the United States proposed in 1951 that the President call a conference of representatives of the administrative agencies, in which representatives of the bar should also participate, for the purpose of considering improvement in administrative procedure, and

WHEREAS, In the opinion of the American Bar Association, it is desirable that such a conference be held, and that the Association participate therein;

RESOLVED, That the Section of Administrative Law be authorized to further the calling by the President of a conference of representatives of the administrative agencies and the bar as proposed by the Judicial Conference of the United States, and when such a conference is called to participate therein in behalf of the American Bar Association; provided that the section be not authorized to advocate any measures without the prior approval of the House or Board of Governors.

Committee on Uniform Rules of the President's Conference

The President's Conference on Administrative Procedure was called by the President on April 28, 1953, and held its first session on June 10-11 of that year. While the Conference was in course of organization, the Section urged upon those concerned inclusion of the subject of uniform rules among the subjects of its consideration. The Attorney General, addressing the first session, supported that view. One of the Conference committees set up was a Committee on Uniform Rules. Charles B. Nutting, last retiring Chairman of the Section and a member of the Conference, was appointed to that Committee. Two

other members of the Section Council, Robert M. Benjamin, then Vice-Chairman of the Section, and Ralph F. Fuchs, then Chairman of the Committee on Improvement of Administrative Procedures, were appointed consultants.

The Committee on Uniform Rules carried on studies through the summer of 1954. It submitted to the final plenary sessions of the President's Conference on October 14-15 and November 8-9, 1954, a long report and proposed resolutions supported by drafts of illustrative rules.

The formal recommendations of the Committee to the Conference were prefaced by the following statement:

> "The Committee on Uniform Rules has recognized at all times that it was not given the job of formulating uniform rules of procedure, but rather of determining the feasibility and desirability of such rules in the various aspects of administrative procedure. We offer, therefore, a general recommendation (I) for adoption by the Conference as an expression of policy.
>
> "The second recommendation is that the Agencies in cooperation with the bar and an Office of Administrative Procedure, consider the adoption of uniform rules on nine specific subjects, using as a basis for such study the illustrative rules which we submit, in the belief they furnish a good starting point for the agencies to achieve progress in developing uniformity. We specifically disclaim the intention of seeking rigid adherence to any proposed illustrative rule but recommend earnest attention to the scope of each.
>
> "Finally, our recommendations relating to identification, citation, and publication of rules (Recommendations III, IV and V) are offered in the belief their acceptance will result not only in uniformity in those areas, but great economies in the future.
>
> "Again attention is called to the three principles urged at the conclusion of our Report, namely, (1) the formulation of uniform rules must be preceded by thorough spade work; (2) they must be evolved in close cooperation with the Agencies and the bar, and (3) there must be provision for continuous study and revision such as we have for the Rules of Civil Procedure, rather than a one-shot operation."

Resolution of the President's Conference

After discussion at the plenary session of November 9, 1954, and some amendment of the resolutions submitted by the Committee on Uniform Rules, the President's Conference adopted the following resolution:

The Conference recommends to the agencies:

Uniformity in Rules. That the agencies, in collaboration with the bar and an Office of Administrative Procedure, if established, undertake a detailed study of the full area within which uniformity in rules is attainable, inasmuch as the Conference finds that it is feasible and desirable to formulate uniform rules for many aspects of administrative procedure.

Uniform Rules on Certain Subjects. That the agencies collaborate with the bar, and with the Office of Administrative Procedure, if established, in the development and adoption of uniform rules

on the following subjects, as to which the Conference finds uniformity to be feasible and desirable, using as a basis for such study (but without approval or disapproval by the Conference of any specific provision thereof) the illustrative rules shown below. [This resolution concluded with a list, by title only, of the illustrative rules submitted by the Committee on Uniform Rules on the subjects of computation of time, service of process, subpoenas, depositions and interrogatories, official notice, presumptions, stipulations and admissions of record in proceedings involving numerous parties, form and content of decisions, and appeals from intermediate decisions.]

S. 17, 83d Congress

S. 17, which had passed in the Senate but not in the House of Representatives in the 82d Congress, was reintroduced by Senator McCarran in the 83d Congress in the same form and under the same number.

Hearings on S. 17 were held by a Subcommittee of the Senate Committee on the Judiciary on March 12, 1953, at which there was testimony by representatives of the Section and of other organizations. The representatives of the Section made it clear that, the House of Delegates not having acted, the American Bar Association had taken no position either expressly favoring or expressly opposing S. 17. They did, however, submit for consideration of the Committee on the Judiciary material including the 1952 report of the Section Committee on Improvement of Administrative Procedures and the 1953 resolutions of the House of Delegates regarding the then-pending Judicial Conference proposal.

The 1952 report of the Section Committee on Improvement of Administrative Procedures, quotations from which appear above, included comments on several specific provisions of S. 17, among them the following comment:

> "The provision of S. 17 for placing the uniform rules in effect is for the Commission to report through the Attorney General to Congress and for the rules to become law ten days after the adjournment of the session at which the report is made, unless previously disapproved by concurrent resolution. This method is the same as that which was applied to the federal Rules of Civil Procedure and Rules of Criminal Procedure. Here, however, the rules would come, not from the branch of government to be bound by them, but from an independent statutory commission. We believe that before rules formulated by such a commission become effective through legislative action (assuming such action to be appropriate), they should receive the concurrence of the Chief Executive in advance of submission or be given the legislative consideration accorded to a bill, including submission to the veto power of the President." (4 Ad. L. Bul. 125.)

Argument on the same point was presented to the Subcommittee by representatives of other organizations.

S. 17 was reported favorably to the Senate by the Committee on the Judiciary on July 20, 1954 (S. Rept. No. 1953), without amendment except for a new provision

that "Such rules shall not deal with qualifications or requirements for admission to practice before such agencies".

The Senate report included the following reference to the work of the President's Conference:

> "Various studies in this field have been made in the past and some are being made today. Notably, studies in the field are in progress by the President's Committee on Administrative Procedure, and by a task force of the Hoover Commission. But neither of those two groups is in a position to promulgate rules; they can only recommend. By creation of the Commission proposed under S. 17, there will be provided a place where such recommendations can be delivered with reasonable hope that they may be implemented."

It made no comment on the objections advanced at the hearing of March 12, 1953, to the method provided in S. 17 for placing uniform rules in effect.

S. 17 as amended passed the Senate on August 11, 1954. It was referred to the Committee on the Judiciary of the House of Representatives, where it was pending when the 83d Congress adjourned.

NATIONAL COMMITTEE REPORT ON LEGISLATION (SUPPLEMENTAL)

The National Committee herewith supplements its Report on Legislation appearing in the August 1954 issue of the Bulletin (6 Ad. L. Bul. 251) by reporting Congressional action on bills between the time its Report was prepared and the adjournment of the 83d Congress:

Senate Bills

S. 14

Reported favorably to the full Committee on the Judiciary from Subcommittee No. 4 July 15, 1954.

S. 17

Reported favorably to the full Committee on the Judiciary from Subcommittee No. 4 July 15, 1954; reported favorably to the Senate with amendment (S. Rept. No. 1953) July 20, 1954; passed the Senate with amendment Aug. 11, 1954; referred to the House Committee on the Judiciary. (See also pp. 31-2, *supra.*)

S. 19

Reported favorably to the Senate with amendments (S. Rept. No. 2201) Aug. 2, 1954; passed the Senate with amendments Aug. 11, 1954; referred to the House Committee on the Judiciary.

S. 26

Reported favorably to the Senate (S. Rept. No. 2156) Aug. 2, 1954.

S. 223

Postponed indefinitely by action of the full Committee on the Judiciary Aug. 2, 1954.

S. 637

Postponed indefinitely by action of the full Committee on the Judiciary Aug. 2, 1954.

S. 906

Reported favorably to the House on Aug. 5, 1954 (H. Rept. No. 2629); passed the House Aug. 19, 1954; vetoed by the President Sept. 2, 1954.

S. 1708

Reported favorably to the full Committee on the Judiciary from Subcommittee No. 4 July 12, 1954; reported favorably to the Senate without amendment (S. Rept. No. 2199) Aug. 2, 1954. (See also pp. 27-8, *supra.*)

House Bills

H. R. 316

Incorporated into H. R. 7839, which was enacted as Public Law 560, approved by the President Aug. 2, 1954.

H. R. 569

Reported favorably to the Senate with amendments Aug. 18, 1954 (S. Rept. No. 2499). (See also pp. 33-4, *infra.*)

H. R. 1418

H. R. 7745 adopted in lieu of H. R. 1418 following public hearings; reported favorably to the House and passed on Aug. 5, 1954 (H. Rept. No. 2638); referred to the Senate Committee on Administration.

H. R. 3288

S. 906 reported in lieu of H. R. 3288; see above.

CHAIRMAN'S PAGE

In the October issue of the American Bar Association Journal (40 A. B. A. J. 879-81) there is an account of the 1954 annual meeting of the Section at Chicago, outlining the principal subjects of discussion and action at that meeting. It is there reported that the Section took emergency action, in collaboration with the Section of Criminal Law, to oppose enactment of H. R. 569, 83d Cong., in the form in which it had passed the House of Representatives and had been scheduled for hearing the next day in the Senate, and that the House of Delegates later the same afternoon adopted the position recommended by the Section. A fuller report on this subject is appropriate here, especially because the President of the Association has since delegated to this Section representation of the Association in this regard.

H. R. 569 provided that upon the institution of obscenity, lottery or fraud proceedings before the Postmaster General he might, if it should appear to him "to be reasonably necessary for the protection of the public or to be in the public interest, * * * order that mail addressed to such person * * * be impounded and detained by the postmaster at the office of delivery pending final decision of the issues involved in said proceedings." By amendment during consideration of the bill in the Committee on Post Office and Civil Service of the House of Representatives, there was added a proviso that any person whose mail was so impounded might dur-

ing the pendency of the proceeding file a complaint in the United States District Court to suspend or enjoin the enforcement of the impounding order "upon a showing that such order was issued arbitrarily, capriciously, or improvidently, *and* that such order is not necessary for the protection of the public or in the public interest" (italics supplied).

Through a misunderstanding, the cause of which need not be detailed here, the House Committee was led to assume that this proviso had been proposed by the American Bar Association and that the Association had approved the bill with the proviso added, though in fact neither the proviso nor the bill as a whole had been considered or acted on by the House of Delegates or the Board of Governors. The Committee's misunderstanding was reflected in its report to the House (H. Rept. No. 850, 83d Cong.).

By the time of the annual meeting in Chicago, consideration in the Senate Committee on Post Office and Civil Service of the bill, already passed by the House of Representatives, had proceeded far and the bill had been scheduled for Committee hearing the day after the Section met in Chicago. It was in these circumstances that the Section proposed, and the House of Delegates adopted, a resolution opposing the impounding of mail without prior resort by the Postmaster General to a United States District Court on notice to the person affected. [The text of the resolution adopted is printed in the Proceedings of the House of Delegates in the American Bar Association Journal (40 A. B. A. J. 871).]

The resolution so adopted was presented the next day, August 17, at the hearing of the Senate Committee on Post Office and Civil Service. On August 18 the Committee reported the bill favorably to the Senate with amendments (S. Rept. No. 2499). There was no reference in this report to the action of the Association or to our objections to the inadequacy of the procedure for judicial review provided for by the bill. One amendment did add a new proviso, that prior to the issuance of the Postmaster General's impounding order the person "whose mail will be affected thereby shall be given notice thereof and shall be accorded a reasonable opportunity to be heard in opposition thereto"; but another amendment provided that "The proceedings under this Act shall not be subject to the requirements of the Administrative Procedures Act."

The bill was pending in the Senate when the 83d Congress adjourned. Under the authority delegated by the President of the Association, the Section is preparing for action when legislation on this subject is reintroduced in the 84th Congress. One important aspect of this preparation is the drafting of a bill to incorporate the proposal for judicial action adopted by the House of Delegates.

On October 14, the Chairman and Vice-Chairman appeared for the Section at a hearing before the Board of Governors on

a proposal, which had originated with the Association's Special Committee on Specialization and Specialized Legal Education, that the American Bar Association set up a Council of Legal Specialists which would have "exclusive authority to create, approve, and establish fields for specialized practice of the law, and to create, approve, establish, supervise, and regulate organizations of specialists within such fields," to be called "Societies."

Your officers argued against this proposal on the following grounds: that the program would play into the hands of lay practitioners before administrative agencies, who claim that they are better specialists than lawyers; that it would play also into the hands of agencies that want to exclude general practitioners; that a man who is not a good general lawyer cannot be a reliable specialist; that a good lawyer is qualified, or can become qualified *ad hoc,* to handle any matter; that a responsible lawyer will keep out of matters as to which he has not been able to educate himself; that the proposed program of specialization makes no adequate provision, nor can adequate provision be made, for testing the basic capacities of those who as specialists become members of specialist societies; and that the Association would be reckless, and acting contrary to the public interest, in conferring its accolade on lawyers who had not been tested for general ability. They argued also against a related proposal for specialized legal education, on the ground that it would be bad to encourage students to specialize before they know what it is like to be a lawyer and before they have any means of judging their own aptitudes.

It appeared to your officers that there was a preponderance of view in accord with ours among those in attendance at the hearing. The Standing Committee on Unauthorized Practice of Law and the Section of Taxation were especially strong in their advocacy of this preponderant view.

The hearing before the Board of Governors being after the annual meeting, there had been no opportunity to discuss this question there and thus to ascertain in advance the views of the Section as a whole. The position taken by your officers was authorized by a mail vote of the Council, which appeared to be sufficient in view of the Section vote at the annual meeting to propose to the House of Delegates at its next mid-winter meeting a new by-law authorizing the Council to act for the Section between meetings.

You will find elsewhere in this issue articles on "Hearing Examiners" and "Uniform Rules," dealing in part with the action taken on these subjects by the President's Conference on Administrative Procedure. The President's Conference held its final plenary sessions on October 14-15 and November 8-9, 1954. Other aspects of its work will be the subject of committee reports and perhaps of further articles in the Bulletin. Two matters relating to the Conference should be recorded here.

At the annual meeting in Chicago the Section adopted the following resolution:

Resolved, that the Section of Administrative Law expresses its appreciation of the continued interest which the President's Conference on Administrative Procedure has manifested in the views of the Section and its members regarding the matters considered by the Conference. The Section looks forward to further cooperation with the Conference in the formulation of its final recommendations and in furthering the objectives which those recommendations are designed to reach. It hopes that the functions of the Conference will be continued either through the continuation of the Conference or the creation of an effective Office of Administrative Procedure.

At its own final session the Conference adopted the following resolution:

Whereas, the President of the United States, in calling this Conference April 28, 1953, suggested that upon completion of our initial assignment we should advise him of our views concerning further such conferences, and

Whereas, in our opinion this Conference has demonstrated the feasibility and the great value of a continued, cooperative self-examination by Government agencies as a means toward improvement of administrative procedure; and participation of the practicing bar and the judiciary is of great aid in achieving desirable results in such conferences, and

Whereas, we believe that the efficient, economical and expeditious disposition of adjudicatory and rule-making proceedings is in the public interest, and

Whereas, such proceedings in the administrative agencies involve multitudes of diverse, detailed, technical rules and practices, known best by those who constantly experience them,

Now, Therefore, Be It Resolved

That this Conference as it adjourns sine die recommends to the President that he constitute upon a permanent basis a conference somewhat similar to this one in organization and operation, composed of delegates from all Government agencies having adjudicatory or rule-making functions, together with appropriate numbers of federal judges and practicing lawyers, which conference would (1) conduct studies of, and make recommendations to the several agencies concerning, improvements in administrative procedure, (2) cooperate with an Office of Administrative Procedure, if established, and (3) meet not less than once a year for the aforesaid purposes.

The Section welcomes this recommendation, reflecting as it does the hope expressed in our own resolution.

There was circulated last spring a questionnaire on which members of the Section were asked to indicate their choices as to service on Section committees. The response was gratifying, indeed overwhelming. The officers of the Section and of Section committees have tried to meet these requests, but they have been faced also with another problem. The effective conduct of committee work, including intra-committee communication, imposes some limitation on the size of committees. We hope that you will understand this necessity, in case you have not received the assignment that you requested, and will maintain your patience and interest until that can be remedied. Whether appointed to a

committee or not, you are cordially invited by the Section officers and committee chairmen to communicate with the chairmen of those committees in whose work you are especially interested, contributing ideas as to the conduct of their committee work and as to subjects that they may have under consideration. Communications by any of you to the Section officers will also be most welcome.

It is hoped also that you will participate in the programs put on by the Section at Regional Meetings of the Association. Whether we shall be able to participate in all such meetings, as we have during the last two years, remains to be determined by the Council, but the present hope is to do so. Further information will appear in later issues of the Bulletin. For the present, the meetings scheduled through the spring of 1956 are listed below:

Pacific-Southwestern Regional Meeting, Phoenix, Arizona, April 13-16, 1955;

Big Seven Regional Meeting, Cincinnati, Ohio, June 8-11, 1955;

Northwestern Regional Meeting, St. Paul, Minnesota, October 12-15, 1955;

Deep South Regional Meeting, New Orleans, Louisiana, November 27-30, 1955;

Northeastern Regional Meeting, Hartford, Connecticut, April 15-18, 1956.

Will you please write to Association headquarters (with a copy to me) requesting any correction of your name or address as they appear on the envelope enclosing this issue of the Bulletin. It is hoped that during the year we shall be able to publish a roster of Section members. This would be compiled from the Association's addressograph plates, and those will be changed only on direct application to headquarters.

ROBERT M. BENJAMIN
Chairman

ORGANIZATION — 1954-5

Section of Administrative Law

OFFICERS

Chairman—Robert M. Benjamin, 1 East 44th St., New York 17, N. Y.

Vice-Chairman—Rufus G. Poole, 1625 K St. N.W., Washington 6, D. C.

Secretary—Patricia H. Collins. Department of Justice, Washington 25, D. C.

COUNCIL [1]

The officers *ex officio* and—

John W. Cragun, Last Retiring Chairman, 744 Jackson Place, N.W., Washington 6, D. C.

John B. Gage, Bryant Bldg., Kansas City 6, Mo. (1955).

Carl McFarland, Montana State University, Missoula, Mont. (1955).

Reuben Hall, 75 Federal St., Boston 10, Mass. (1956).

[1] The terms of Council members expire at the annual meeting in the year shown following their names.

E. Blythe Stason, University of Michigan Law School, Ann Arbor, Mich. (1956).

Donald C. Beelar, World Center Bldg., Washington 6, D. C. (1957).

Ralph F. Fuchs, 1410 East University St., Bloomington, Ind. (1957).

Charles B. Nutting, University of Pittsburgh, Pittsburgh 13, Pa. (1958).

Harold L. Russell, Citizens & Southern Nat'l Bank Bldg., Atlanta 3, Ga. (1958).

SECTION DELEGATE TO HOUSE OF DELEGATES

Ashley Sellers, 1625 Eye St., N.W., Washington 6, D. C. (term ending 1956).

COMMITTEES ON PARTICULAR FEDERAL AGENCIES OR ACTIVITIES

Advertising, Trade and Securities Regulation:

Sumner S. Kittelle, Chairman, 420 Lexington Ave., New York 17, N. Y.

Chester T. Lane, Vice-Chairman, 150 Broadway, New York 38, N. Y.

Agriculture, Food, Drugs and Related Subjects:

Albert E. Stephan, Chairman, Central Bldg., Seattle 4, Wash.

Jesse E. Baskette, Vice-Chairman, 1625 Eye St., N.W., Washington 6, D. C.

Communications:

Arthur W. Scharfeld, Chairman, National Press Bldg., Washington 4, D. C.

William I. Denning, Vice-Chairman (Post Office Dept. Matters), 1518 K St., N.W., Washington 5, D. C.

Comptroller General—General Accounting Office:

William D. McGraw, Chairman, 1420 Arlington Drive, Apt. 140, Alexandria, Va.

Everett A. Mathews, Vice-Chairman, 333 Montgomery St., San Francisco 4, Calif.

Emergency Agencies:

Hans A. Klagsbrunn, Chairman, 1200 Eighteenth St., N.W., Washington 6, D. C.

Gas and Electric Power:

James O'Malley, Jr., Chairman, 15 Broad St., New York 5, N. Y.

Olcott D. Smith, Vice-Chairman, 750 Main St., Hartford 3, Conn.

Immigration and Naturalization:

Louis L. Jaffe, Chairman, Harvard University Law School, Cambridge 38, Mass.

Benjamin G. Habberton, Vice-Chairman, Shoreham Bldg., Washington 5, D. C.

Jack Wasserman, Vice-Chairman, Warner Bldg., Washington 4, D. C.

Labor:

Milton C. Denbo, Chairman, 1625 K St., N.W., Washington 6, D. C.

Plato E. Papps, Vice-Chairman, 9th St. and Mt. Vernon Place, N.W., Washington 1, D. C.

Gerard D. Reilly, Vice-Chairman, Tower Bldg., Washington 5, D. C.

Natural Resources and Interior Affairs:

Northcutt Ely, Chairman, Tower Bldg., Washington 5, D. C.

Hugh Fullerton, Vice-Chairman, 1625 K St., N.W., Washington 6, D. C.

Arnold Levy, Vice-Chairman, Washington Bldg., Washington 5, D. C.

TRANSPORTATION:

J. D. Bond, Chairman, 1415 N. Adams St., Arlington, Va.

L. Welch Pogue, Vice-Chairman (Air Transportation), Southern Bldg., Washington 5, D. C.

John R. Turney, Vice-Chairman (Motor Carrier Transportation), DuPont Circle Bldg., Washington 7, D. C.

Harry J. Breithaupt, Jr., Vice-Chairman (Rail Transportation), Transportation Bldg., Washington 6, D. C.

Donald Macleay, Vice-Chairman (Water Transportation), 1625 K St., N.W., Washington 6, D. C.

COMMITTEES ON PARTICULAR LEGISLATION OR PROPOSALS

ADMINISTRATIVE AGENCY FEES AND CHARGES (Special):

Clarence D. Todd, Chairman, Washington Bldg., Washington 5, D. C.

Ralph E. Becker, Vice-Chairman, 1346 Connecticut Ave., N.W., Washington 6, D. C.

ADMINISTRATIVE PRACTITIONERS—ADMISSION AND ETHICS:

F. Trowbridge vom Baur, Chairman, Room 2034 Main Navy Bldg., Washington 25, D. C.

Richard S. Doyle, Vice-Chairman, Transportation Bldg., Washington 6, D. C.

ADMINISTRATIVE PROCEDURE ACT:

Robert K. McConnaughey, Chairman, Walker Bldg., Washington 5, D. C.

Smith W. Brookhart, Vice-Chairman, 1025 Connecticut Ave., N.W., Washington 6, D. C.

Chisman Hanes, Vice-Chairman, Ring Bldg., Washington 6, D. C.

Earl W. Kintner, Vice-Chairman, Federal Trade Commission, Washington 25, D. C.

CODE OF CONDUCT OF GOVERNMENT EMPLOYEES (Special):

John A. McIntire, Chairman, 5317 Carvel Road, Washington 16, D. C.

GOOD FAITH RELIANCE ACT (Special):

Frank C. Newman, Chairman, University of California School of Law, Berkeley 4, Calif.

John T. Fey, Vice-Chairman, George Washington University Law School, Washington 6, D. C.

Hans A. Klagsbrunn, Vice-Chairman, 1200 Eighteenth St., N.W., Washington 6, D. C.

HEARING EXAMINERS:

Herman Tocker, Chairman, 734 Fifteenth St., N.W., Washington 5, D. C.

IMPROVEMENT OF ADMINISTRATIVE PROCEDURES:

Ralph F. Fuchs, Chairman, 1410 East University St., Bloomington, Ind.

John C. Pirie, Vice-Chairman, 135 East 42nd St., New York 17, N. Y.

JUDICIAL REVIEW:

John D. Conner, Chairman, 1625 Eye St., N.W., Washington 6, D. C.

Henry M. Shine, Jr., Vice-Chairman (Federal Courts), 3118 General Accounting Office Bldg., Washington 25, D. C.

Frank E. Cooper, Vice-Chairman (State Courts), Ford Bldg., Detroit 26, Mich.

Public Contracts:

Robert Sheriffs Moss, Chairman, 821 Fifteenth St., N.W., Washington 5, D. C.

Bernard J. Gallagher, Vice-Chairman, Union Trust Bldg., Washington 5, D. C.

Termination of Public Contracts (Special):

Valentine B. Deale, Chairman, 1001 Connecticut Ave., N.W., Washington 6, D. C.

Henry G. Beauregard, Vice-Chairman, Ring Bldg., Washington 6, D. C.

GENERAL AND MISCELLANEOUS COMMITTEES

Administrative Law Bulletin:

Bernard Schwartz, Editor, New York University School of Law, Washington Square, New York 3, N. Y.

Annual Meeting:

Robert H. Young, Chairman, Fidelity-Philadelphia Trust Bldg., Philadelphia 9, Pa.

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